as Exhibit A is a true and correct copy of the letter dated June 6, 1984, and attached hereto as Exhibit B is a true and correct copy of the envelope in which the letter was received.

12. According to the terms of the letter, the letter was intended to be a formal modification of the approved plan of operation for the Muskego Landfill site operated by Waste Management of Wisconsin, Inc. Upon information and belief, according to the second to the last paragraph on page 12 of the letter, the Department of Natural Resources intended the letter to be final agency action reviewable pursuant to §§ 227.15 and 227.16, Wis. Stats.

13. The Muskego Sanitary Landfill site is in compliance with all regulations which were promulgated and in effect at the time the area known as the Southeast Area was licensed and received approval for its plan of operation, and the Muskego Landfill site is also in compliance with all rules and regulations promulgated and in effect at the time the plan of operation was approved for the currently active area of the landfill site.

14. At no time prior to issuing Exhibit A, did the Wisconsin Department of Natural Resources provide the petitioner with notice that the Department intended to modify the Approved Plan of Operation for the Muskego Sanitary Landfill, and at no time did the Wisconsin Department of Natural Resources provide the petitioner with a meaningful opportunity to be heard with respect to the modification of the Approved Plan of Operation for the Muskego Sanitary Landfill.

15. In issuing the letter dated June 6, 1984, the Wisconsin Department of Natural Resources failed to make

any findings of fact, failed to make any conclusions of law, and upon information and belief, the individuals who signed and issued such letter were not authorized to take such action on behalf of the Wisconsin Department of Natural Resources and were not appropriately designated by the Secretary of the Wisconsin Department of Natural Resources to take action on his behalf. In taking such actions, the Wisconsin Department of Natural Resources failed to follow its own procedures and the procedures required to be followed by the Wisconsin Department of Natural Resources under the Wisconsin Statutes as a condition precedent to the exercise of its authority.

16. Despite the express language of § 144.44(3)(d), Wis. Stats. (1977), and § 144.44(3)(d), Wis. Stats. (1981-82), the letter dated June 6, 1984, fails to set forth any of the findings required by the referenced statute as a condition precedent to a modification to the Approved Plan of Operation approved on November 28, 1979, and due to the failure of the Wisconsin Department of Natural Resources to make such findings, the letter exceeds the authority delegated to the Wisconsin Department of Natural Resources and limited by § 144.44(3)(d), Wis. Stats. (1977), and § 144.44(3)(d), Wis. Stats. (1981-82).

17. The letter dated June 6, 1984, is void and unenforceable for the reason that the letter attempts to incorporate conditions into a previously approved Plan of Operation which are not set forth in any standard for design, construction, sanitation, operation or maintenance of a sanitary landfill site which has been formally promulgated by the Wisconsin Department of Natural Resources under the authority granted to it under §§ 144.435 or

144.62, Wis. Stats. The letter therefore exceeds the authority delegated to the Wisconsin Department of Natural Resources under § 144.44(3)(c), Wis. Stats.

18. Upon information and belief, the same individuals who considered any evidence relied upon by the Department of Natural Resources, also commented upon such evidence and also recommended the issuance of the letter dated June 6, 1984. Such individuals also drafted the letter and made the final decision to issue the letter to the petitioner, and the participation of those individuals in both the investigatory and adjucatory functions of the Wisconsin Department of Natural Resources violates the petitioner's rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

19. The failure of the Wisconsin Department of Natural Resources to provide the petitioner with notice and a meaningful opportunity to be heard prior to the issuance of the letter violates the petitioner's rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

20. Upon information and belief, the letter dated June 6, 1984, is not supported by substantial evidence and is not supported by a clear preponderance of the credible evidence.

WHEREFORE, Waste Management of Wisconsin, Inc. respectfully requests that the Court grant it the following relief:

1. Declaring that the letter dated June 6, 1984, to be void and unenforceable;

2. In the alternative, remanding this matter to the Department of Natural Resources for a contested case hearing to be conducted as a Class 2 proceeding;

3. Awarding the petitioner its taxable costs and disbursements; and

4. Granting the petitioner such further relief, whether at law or equity, as may be determined by the Court to be appropriate.

Dated at Milwaukee, Wisconsin, this 13th day of July, 1984.

FRIEBERT, FINERTY & ST. JOHN

/s/ By: William S. Roush, Jr.
Attorneys for Plaintiff

P.O. ADDRESS:

710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-0130

4624/50

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

WASTE MANAGEMENT OF WISCONSIN, INC., a Wisconsin corporation,

Plaintiff,

v. Civil Action No. 83-C-1764

CARROLL D. BESADNY, in his official capacity as Secretary of the Wisconsin Department of Natural Resources; the WISCONSIN DEPARTMENT —OF NATURAL RESOURCES, an Agency of the State of Wisconsin, and their officers, Agents, Servants, Employees, Attorneys, and all those persons in active participation with them,

Defendants.

STIPULATION

The plaintiff Waste Management of Wisconsin, Inc. by its attorneys Friebert, Finerty & St. John, and the defendants Carroll D. Besadny, in his capacity as Secretary of the Wisconsin Department of Natural Resources, and the Department of Natural Resources, by their attorneys Bronson C. LaFollette, Attorney General, and Carl A. Sinderbrand, Assistant Attorney General, hereby stipulate and agree to the following facts:

1. Waste Management of Wisconsin, Inc. is a Wisconsin corporation engaged in the business *inter alia* of owning and operating sanitary landfill sites, with its prin-

cipal place of business located at 3333 North Mayfair Road, Milwaukee, Wisconsin, 53222.

2. The defendant Carroll D. Besadny is the Secretary of the Wisconsin Department of Natural Resources ("the Department") who directly or indirectly is responsible for administering all of the powers and duties of the Wisconsin Department of Natural Resources and whose office is located at 101 South Webster Street, Madison, Wisconsin.

3. The defendant Wisconsin Department of Natural Resources is a state agency created pursuant to § 15.34, Wis. Stats., and is responsible for the licensing and regulation of sanitary landfill sites pursuant to Chapter 144, Wis. Stats.

4. The plaintiff is the lessor and operator for profit of a sanitary landfill site known as Muskego Sanitary Landfill, located in Waukesha County, Wisconsin. The landfill site is operated under licenses issued by the Wisconsin Department of Natural Resources, License Nos. 0141 and 2895, but that portion of the landfill subject to License No. 0141 has not actively accepted solid waste since 1981. Copies of the most recent licenses are attached hereto as Exhibits A and B, respectively.

5. Prior to issuance of License Nos. 0141 and 2895 (Exhibits A and B), other portions of the Muskego Sanitary Landfill were operated under License Nos. 0141 and 0936(a/k/a License Nos. 141 and 936). By an Order dated August 6, 1975, bearing No. 2A-75-1003, the Department ordered abandonment of those portions of the landfill. A copy of this Order is attached as Exhibit C. The time

deadlines set forth in Exhibit C were extended by the Department, and the ordered abandonment was completed according to the terms of the Order.

6. The landfill site is also operated under Plans of Operation, which were approved by the Department and whose terms are incorporated into the operating licenses.

SOUTHEAST AREA

7. On February 4, 1977 the Department approved the plaintiff's plan of operation for the construction and operation of the Southeast Area of the Muskego Sanitary Landfill pursuant to Chapter 144, Wis. Stats., (1975). A copy of that approved plan of operation and the Department's Division Report thereon are filed herewith as Exhibit D.

8. Filed herewith as Exhibit E is a copy of a February 11, 1977 letter from the Department to the plaintiff, with attachments, which authorizes disposal of waste in the southeast area.

9. Shortly thereafter, the plaintiff received from the Department an operating license regarding the Southeast Area pursuant to § 144.44(4)(b), Wis. Stats. (1975).

10. The plaintiff operated the Southeast Area of the Sanitary Landfill after receiving the approved plan of operation (Exhibit D) and License 0141 (Exhibit A). In 1981, the plaintiff stopped accepting solid waste in the Southeast Area, but is still bound to maintain that area according to the approved plan of operation.

EXPANSION AREA

11. On November 28, 1979, the Department of Natural Resources approved a second plan of operation for a

proposed landfill expansion submitted by the plaintiff for additional construction and continued operation of the Muskego Sanitary Landfill pursuant to § 144.44(3)(c), Wis. Stats. (1977). A copy of that approved plan of operation and the Department Report is filed herewith as Exhibit F.

12. Filed herewith as Exhibit G is a copy of a letter sent by the Department to the plaintiff dated July 3, 1980, which authorizes the plaintiff to begin site operations in the expansion area upon receipt of the operating license.

13. Shortly thereafter, the Department issued an operating license pursuant to § 144.44(4)(b), Wis. Stats. (1977) for the expansion area.

COMPLIANCE AND LICENSE RENEWALS

14. The plaintiff incurred substantial costs to construct its landfill site in accordance with the approved Plans of Operation. The plaintiff continuously incurs substantial costs to operate the facility in accordance with the approved Plans of Operation.

15. The plaintiff's licenses to operate the landfill site (southeast area and the expansion area) have been continuously renewed since the date of the initial licenses pursuant to § 144.44, Wis. Stats.

16. It is the Department's position that the Plaintiff has not substantially complied with its Plans of Operation and applicable administrative regulations. It is the Department's position that Waste Management has failed to consistently maintain leachate head levels in accordance

with the February 4, 1977 plan of operation, and that the landfill is operated in a manner which violates § NR 151.12(4)(b) Wis. Adm. Code (1977), and § NR 180.13 (10)(a)2. Wis. Adm. Code. The plaintiff denies each of these assertions. To date, no enforcement action has been initiated or administrative hearing held on these issues.

17. The plaintiff has never failed to pay the fees required by §§ 144.43 to 144.47, Wis. Stats.

18. The defendants have never denied, suspended or revoked the plaintiff's operating license for the Muskego Landfill Site, nor have the defendants brought an enforcement action against the plaintiff pursuant to § 144.47, Wis. Stats., with respect to the Muskego Landfill Site, although the Department considers the abandonment order referenced in paragraph 5 to be a type of enforcement action.

19. The expansion area of the Muskego Landfill Site covered by Exhibit B is subject to § 144.441, Wis. Stats. (1977), and the plaintiff is responsible under that section for the long term care of the site for thirty (30) years after the closing thereof.

DEPARTMENT MODIFICATIONS

20. On September 23, 1983, the Department sent the plaintiff a letter which the Department intended to be a modification of the plaintiff's existing approved Plans of Operation. A copy of the letter is filed herewith as Exhibit H. The Department did not provide the plaintiff with notice or a hearing prior to the modification, nor did it provide a subsequent hearing.

21. The September 23, 1983 letter modified the Plans of Operation for both the Southeast and the expansion areas. Among other things, the letter requires the plaintiff to develop and submit a plan "for lowering leachate head levels in the Southeast Fill Area to a dry base level." The preparation of such a plan would require the expenditure of additional sums of money. The development of the plan, itself, would not change the day-to-day activities of the site. The implementation of such a plan, if ordered, would require the plaintiff's expenditure of unknown additional sums of money and further would result in a change of the day-to-day activities of the site.

22. Filed herewith as Exhibit I is a copy of the plaintiff's Request for Contested Case Hearing pursuant to § 227.064, Wis. Stats., filed by the plaintiff with the Department regarding the September 23, 1983 letter.

23. Filed herewith as Exhibit J is a copy of the Department's response denying the plaintiff's request for a contested case hearing on the modifications set forth in the September 23, 1983 letter.

24. On June 6, 1984, the Department sent the plaintiff another letter which the Department intended to be a modification of the plaintiff's existing approved Plans of Operation. A copy of the letter is filed herewith as Exhibit K. The Department did not provide the plaintiff with notice or a hearing prior to the modification, nor did it provide a subsequent hearing.

25. The June 6, 1984 letter contains the Department's review of whether the plaintiff had complied with the September 23, 1983 letter. However, it also contains

additional modifications to the approved Plans of Operation. The modification letter requires that Waste Management take certain actions including the following, each of which involves the expenditure of additional sums of money:

a. Submit to the Department a proposed scope of work containing what the Department believes to be "an adequate number of [leachate] extraction points and a commitment by WMWI to remove and treat all leachate possible . . ."

b. Gather the data for and submit to the Department abandoned documentation for certain abandoned areas of the site.

c. Institute an expanded groundwater monitoring program.

d. Prepare and submit a report and provide an assessment regarding gas production and migration.

e. Prepare and submit a compilation of all leachate head level measurements and submit a "complete record of all leachate recirculated, hauled to MMSD for treatment, or otherwise disposed of."

f. Submit a report correcting certain leachate elevations, including a discussion of all "implications of this error and their significance."

g. Gather the information for, prepare and submit a report regarding the past and present operation of a sand and gravel pit adjacent to the old fill area which is neither owned nor operated by Waste Management. This report is to include "[a]n assessment of the potential for pumping from this operation to induce groundwater flow from the landfill area."

26. It is the Department's position as stated in the June 6, 1984 letter, that Waste Management is in violation

of the September 23, 1983 modification letter and both the September 23, 1983 and June 6, 1984 modification letters are agency action enforceable under sections 144.47, 144.98 and 144.99, Wis. Stats.

27. Attached hereto as Exhibit L is a copy of the Plaintiff's Request for a Contested Case Hearing pursuant to § 227.064, Wis. Stats., filed by the plaintiff with the Department regarding the June 6, 1984 letter.

28. Attached hereto as Exhibit M is a copy of the Department's response denying the plaintiff's Request for a Contested Case Hearing on the June 6, 1984 letter.

29. The process utilized by the Department in issuing and denying a hearing on the Septmber 23, 1983 and the June 6, 1984 modifications is consistent with prior and subsequent Department practice, which practice the Department intends to continue.

30. Prior to issuing Exhibit H and K the Department did not determine that an emergency situation existed, nor that the existence or operation of the Muskego Landfill Site posed an imminent hazard to the public health or welfare. No such determinations have been made to date by the Department.

31. The Muskego Landfill Site was constructed in accordance with the Plans of Operation, as originally approved by the Department.

32. Attached hereto as Exhibit N is a Memorandum Decision and Order of the Wisconsin Circuit Court in Case Nos. 553-751, 553-752, and 610-729 by the Honorable Michael D. Goulee. Attached as Exhibit O is a Memorandum Decision and Order of the Wisconsin Circuit Court

in Case No. 533-816 by the Honorable John E. McCormick. Attached as Exhibit P is a Decision and Order of the Circuit Court for Milwaukee County in Case No. 534-956 by the Honorable Thomas P. Doherty. Appeals regarding Exhibits N, O and P are pending in the Wisconsin Court of Appeals. None of these cases involve the Muskego Landfill Site.

33. The parties reserve the right to object to the relevancy or materiality of any of the above-stipulated facts.

34. The parties agree that this stipulation and the answers to the plaintiff's interrogatories (and the supplemental answers thereto) contain the only factual matters which the parties will submit for the summary judgment resolution of this matter and neither party will submit affidavits in connection with the summary judgment motion.

Dated at Milwaukee, Wisconsin, this 30th day of November, 1984.

FRIEBERT, FINERTY & ST. JOHN

By: /s/ Robert H. Friebert
Attorneys for Plaintiff

Dated at Milwaukee, Wisconsin, this 30th day of ber, 1984.

BRONSON C. LA FOLLETTE
Attorney General

By /s/ Carl A. Sinderbrand
Assistant Attorney General

Attorneys for Defendants

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CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

U. S. Const. amend XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wis. Stat. § 144.44(3)(c) (1985-86):

> *Approval; disapproval.* The department may not approve or disapprove a plan of operation until a favorable determination of feasibility has been issued for the facility. Upon the submission of a complete plan of operation, the department shall either approve or disapprove the plan in writing within 90 days or within 60 days after a favorable determination of feasibility is issued for the facility, whichever is later. The determination of the department shall be based upon compliance with the standards established under s. 144.435 or, in the case of hazardous waste facilities, with the rules and standards established under s. 144.62. An approval may be conditioned upon any requirements necessary to comply with the standards. Any approval may be modified by the department upon application of the licensee if newly discovered information indicates that the modification would not inhibit compliance with the standards adopted under s. 144.435 or, if applicable, s. 144.62. No plan of operation for a solid or hazardous waste facility may be approved unless the applicant submits technical and financial information required under ss. 144.441 and 144.443.

Wis. Stat. § 144.44(3)(d) (1985-86):

Approval. Approval under par. (c) entitles the applicant to construct the facility in accordance with the approved plan for not less than the design capacity specified in the determination of feasibility, unless the department establishes by a clear preponderance of the credible evidence that:

1. The facility is not constructed in accordance with the approved plan;

2. The facility poses a substantial hazard to public health or welfare; or

3. In-field conditions, not disclosed in the feasibility report or plan of operation, necessitate modifications of the plan to comply with standards in effect at the time of plan approval under s. 144.435 or, if applicable, s. 144.62.

Wis. Stat. § 144.44(3)(e) (1985-86):

Failure to comply with plan of operation. Failure to operate in accordance with the approved plan subjects the operator to enforcement under s. 144.47 or 144.73. If the department establishes that any failure to operate in accordance with the approved plan for a solid waste disposal facility is grievous and continuous, the operator is subject to suspension, revocation or denial of the operating license under sub. (4). If the operator fails to operate a hazardous waste facility in accordance with the approved plan, the department may suspend, revoke or deny the operating license under sub. (4).

Wis. Stat. § 144.44(4) (1985-86):

OPERATING LICENSE. (a) *License requirement.* No person may operate a solid waste facility or hazardous waste facility unless the person obtains an operating license from the department. The department shall issue an operating license with a duration of one year or more except that the department may

issue an initial license with a duration of less than one year. The department may deny, suspend or revoke the operating license of a solid waste disposal facility for failure to pay fees required under ss. 144.43 to 144.47 or for grievous and continuous failure to comply with the approved plan of operation under sub. (3) or, if no plan of operation exists with regard to the facility, for grievous and continuous failure to comply with the standards adopted under s. 144.435. The department may deny, suspend or revoke the operating license of a hazardous waste facility for failure to pay the fees required under ss. 144.43 to 144.47 or for failure to comply with the approved plan of operation under sub. (3). If the license application is for a solid waste disposal facility for solid waste resulting from mining operations in existence on May 21, 1978, the department shall make any determination with respect to whether disposal is being undertaken in an environmentally sound manner and shall administer compliance with the licensing requirement of this subsection in a manner which, with respect to nonhazardous solid waste, does not require substantial structural modification of the existing facility, expenditure which is not appropriate for the nonhazardous nature of the waste or interruption of the mining operation.

. . . .

(b) *Issuance of initial license.* The initial operating license for a solid waste disposal facility or a hazardous waste facility shall not be issued unless the facility has been constructed in substantial compliance with the operating plan approved under sub. (3). The department may require that compliance be certified in writing by a registered professional engineer. The department may by rule require, as a condition precedent to the issuance of the operating license for a solid waste disposal facility, that the applicant submit evidence that a notation of the exist-

ence of the facility has been recorded in the office of the register of deeds in each county in which a portion of the facility is located.

Wis. Stat. § 144.47 (1985-86):

Violations: enforcement. (1)(a) If the department has reason to believe that a violation of ss. 144.43 to 144.47 or any rule promulgated or special order, plan approval, or any term or condition of a license issued under those sections occurred, it may:

1. Cause written notice to be served upon the alleged violator. The notice shall specify the law or rule alleged to be violated, and contain the findings of fact on which the charge of violation is based, and, except as provided in s. 144.44(8), may include an order that necessary corrective action be taken within a reasonable time. This order shall become effective unless, no later than 30 days after the date the notice and order are served, the person named in the notice and order requests in writing a hearing before the department. Upon such request, the department shall after due notice hold a hearing. Instead of an order, and except as provided in s. 144.44(8), the department may require that the alleged violator appear before the department for a hearing at a time and place specified in the notice and answer the charges complained of; or

2. Initiate action under s. 144.98.

(b) If after such hearing the department finds that a violation has occurred, it shall affirm or modify its order previously issued, or issue an appropriate order for the prevention, abatement or control of the problems involved or for the taking of other corrective action as may be appropriate. If the department finds that no violation has occurred, it shall rescind its order. Any order issued as part of a notice or after hearing may prescribe one or more dates by which necessary action shall be taken in preventing, abating or controlling the violation.

Wis. Stat. § 144.99 (1985-86):

> *Penalties.* Any person who violates this chapter, except ss. 144.30 to 144.426 and 144.96(1), or any rule promulgated or any plan approval, license or special order issued under this chapter, except under those sections, shall forfeit not less than $10 nor more than $5,000, for each violation. Each day of continued violation is a separate offense. While the order is suspended, stayed or enjoined, this penalty shall not accrue.

Wis. Stat. § 227.47 (1985-86):

> *Decisions.* Every proposed or final decision of an agency or hearing examiner following a hearing and every final decision of an agency shall be in writing accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise and separate statement of the ultimate conclusions upon each material issue of fact without recital of evidence. Every proposed or final decision shall include a list of the names and addresses of all persons who appeared before the agency in the proceeding who are considered parties for purposes of review under s. 227.53. The agency shall by rule establish a procedure for determination of parties.

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